

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

IN RE: PHENYLPROPANOLAMINE  
(PPA) PRODUCTS LIABILITY  
LITIGATION,

MDL NO. 1407

ORDER GRANTING PROCTER &  
GAMBLE PHARMACEUTICALS'  
MOTION FOR SUMMARY JUDG-  
MENT

This document relates to:

*Conner v. Bayer Corp.*, C05-76

Plaintiff Naomi Conner alleges that she suffered a stroke after ingesting three PPA-containing over-the-counter medications: Alka Seltzer Plus Cold Medicine, Robitussin CF and Vick's DayQuil. This matter comes before the court on a motion by defendant Procter & Gamble Pharmaceuticals for summary judgment, and on plaintiff's motion to amend her complaint.

A. Motion for Summary Judgment

Defendant's summary judgment motion relies on the simple assertion that it had no involvement in the manufacture, marketing or distribution of the medications plaintiff alleges are related to her injuries. P&G Pharmaceuticals concedes that it was involved in the manufacture of Entex, a prescription medication containing PPA, and also submits that Procter & Gamble Distributing Company, a related but separate entity, produced Vick's DayQuil. As P&G Pharmaceuticals points out, the Procter & Gamble

1 Company - the parent company of both the above-named entities -  
2 has dozens of subsidiaries, a fact that was publicly known at the  
3 time plaintiff filed suit.

4 In her response, plaintiff submits in evidence only a copy  
5 of the Physicians Desk Reference, which refers to "Procter &  
6 Gamble" as manufacturer of Vick's DayQuil. Plaintiff does not  
7 directly dispute that P&G Pharmaceuticals was not involved in  
8 production of the medications at issue, address the distinction  
9 between P&G Pharmaceuticals and P&G Distributing, or otherwise  
10 present evidence that would support holding one entity liable for  
11 the alleged actions of the other. Instead, she repeatedly refers  
12 to "Procter & Gamble" as if it were a single entity, conflating  
13 P&G Pharmaceuticals, which she named in the complaint, with P&G  
14 Distributing, which is concededly responsible for the manufacture  
15 and distribution of the medicine at issue. She falls far short,  
16 therefore, of meeting her burden of demonstrating that there is a  
17 genuine issue of material fact in this case as it relates to P&G  
18 Pharmaceuticals. Summary judgment as to P&G Pharmaceuticals is  
19 therefore appropriate and is hereby granted. P&G Pharmaceuticals  
20 is dismissed.

21 B. Motion to Amend

22 In her response to the motion for summary judgment plaintiff  
23 embeds an alternative "Motion for Substitution of Parties."  
24 Plaintiff asks the court to substitute P&G Pharmaceuticals with  
25 P&G Distributing Company, the company admittedly involved in the  
26 production of the medications allegedly related to plaintiff's

1 stroke.

2 Defendant objects to plaintiff's request that the court  
3 allow the amendment, relying on the standard under Fed. R. Civ.  
4 P. 15(a) and Ninth Circuit law that although such amendment be  
5 freely granted, amendment should not be allowed where there is  
6 undue delay, prejudice, or bad faith, or where the proposed  
7 amendment would be futile. *See, e.g., Bonin v. Calderon*, 59 F.3d  
8 815, 845 (9th Cir. 1995). Defendant asserts that the delay was  
9 undue because plaintiff (or her counsel) has long known of the  
10 distinction between the two P&G entities, and knew that P&G  
11 Distributing (and not P&G Pharmaceuticals) manufactured Vick's  
12 DayQuil, yet has failed until now to attempt to name the proper  
13 party. Defendant further claims prejudice resulting from the fact  
14 that plaintiff's injury occurred approximately nine and a half  
15 years ago, and that the statute of limitations on her claims have  
16 run. For this reason, also, defendant asserts that plaintiff's  
17 proposed amendment would be futile, as her claims would be  
18 immediately dismissed on statute of limitations grounds.

19 Plaintiff does not address defendant's assertion that her  
20 delay in seeking to substitute the proper party is undue, and  
21 makes no explanation therefor. Plaintiff also does not dispute  
22 that the statute of limitations has run on her claims against P&G  
23 Distributing, but submits that the court should allow those  
24 claims to relate back to the time of the filing of her original  
25 complaint. Where the claims arise out of the same conduct or  
26 occurrence, an amendment to a complaint may relate back to the

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1 date of original filing where the substituted party (1) had  
2 notice of the institution of the original action; (2) will not  
3 suffer undue prejudice resulting from the delay; and (3) is aware  
4 that but for plaintiff's mistake, it should have been named in  
5 the original complaint. Fed. R. Civ. P. 15(c).

6 According to Fed. R. Civ. P. 15(c)(3), an amendment can only  
7 relate back to the original complaint where notice is received  
8 "within the period provided by Rule 4(m) for service of the  
9 summons and complaint." As this court has already ruled, notice  
10 in this case was inadequate and untimely under Fed. R. Civ. P.  
11 4(m). *See Conner v. Bayer Corp.*, C05-76, Order Denying Defen-  
12 dant's Motion to Dismiss at 3, July 5, 2005. Plaintiff's bald  
13 assertion that P&G Distributing had notice of the pending lawsuit  
14 against P&G Pharmaceuticals because both entities are represented  
15 by the same law firm is an inadequate response given the plain  
16 language of the rule. Her failure to effect timely and proper  
17 notice is fatal to her motion to amend, which is therefore  
18 denied.

19 For the foregoing reasons, defendant P&G Pharmaceuticals'  
20 motion for summary judgment is GRANTED. Plaintiff's motion for  
21 substitution is DENIED.

22 DATED at Seattle, Washington this 17th day of November,  
23 2005.

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25 BARBARA JACOBS ROTHSTEIN  
26 UNITED STATES DISTRICT JUDGE